

Case Summary

Gary Becker appeals the post-conviction court's denial of his motion for educational credit time. We reverse and remand.

Issue

Becker raises one issue on appeal, which we restate as whether the post-conviction court properly denied his request for educational credit time.

Facts

On January 18, 1994, Becker was sentenced to eight years, with six suspended to probation, for Class B felony rape.¹ While he was incarcerated, Becker earned his general education development diploma ("GED") and was awarded some educational time credit. The details on the exact amount of credit time awarded are not clear. He completed the GED on August 26, 1994. Becker filed a motion to correct erroneous sentence on September 20, 1994, which was granted on October 18, 1994.² At that time, the trial court ordered Becker to be placed on probation for six years, and returned him to the Department of Correction ("DOC") with fifty-three days of credit time. Becker was released to probation on October 21, 1994.

During his probation, Becker was arrested and convicted of several new offenses. The scant details in the record of these other offenses only appear in the chronological

¹ His conviction was affirmed by this court on February 15, 1995. Becker v. State, 646 N.E.2d 978 (Ind. Ct. App. 1995).

² The September 20, 1994 motion to correct erroneous sentence is not part of the record on appeal. It is unclear whether this motion sought to address the addition of credit time for Becker's recently earned GED or whether Becker was addressing a recent modification of his sentence. Earlier that year, on February 15, 1994, the State filed a "Motion to Correct Justice Record" and Becker's sentence was ordered to be four years executed, four suspended, and two years on probation. App. pp. 15-16.

case summary. It appears Becker was convicted of Class C felony escape in one action and Class B felony rape and criminal deviate conduct, Class C felony escape, Class D felony confinement, and misdemeanor battery in another action. On March 5, 1997, Becker admitted to the new offenses and his probation was revoked. The trial court reinstated his remaining sentence. The trial court ordered him to serve six years, and he was given 759 days credit time for confinement. Becker did not appeal this ruling.

On June 4, 2008, Becker filed a classification appeal with the DOC requesting additional credit time. He contended that he had only received twenty-nine days of the available 180 days of credit when he received his GED in 1994. The DOC denied his request, stating:

You are ineligible to receive a time cut for any program you may have completed in a prior incarceration period. If you wish to receive any additional time cuts they can only be for programs which you complete during your current period of incarceration.

App. p. 36.³

Becker then filed a “Motion for Educational Credit Time” with the post-conviction court on July 21, 2008. The post-conviction court found that Becker “should not be entitled to the educational credit time that could have been accrued prior to his first release from the Department of Corrections and subsequent probation revocation.” App. p. 64(a). It denied his request on August 21, 2008. This appeal followed.⁴

³ Presumably, the DOC official is referencing the fact that Becker is currently incarcerated for different charges.

⁴ The State does not contend that Becker has failed to exhaust administrative remedies within the DOC, nor does it contend that his credit claim is moot.

Analysis

We treat Becker's motion for credit time as a post-conviction relief petition under Indiana Post Conviction Rule 1, as we have treated similar petitions. See McGee v. State, 790 N.E.2d 1067, 1069 (Ind. Ct. App. 2003) (reasoning that it is not inconsistent with Indiana Post Conviction Rule 1 to allow post conviction review of credit time determinations when immediate release is not the relief sought), trans. denied. In McGee, we held that even though McGee's motion was not specifically designated as a post-conviction relief petition, it was filed in the court of his conviction and that court had jurisdiction to entertain the motion and review DOC's determination regarding the credit time. Id.; see also Members v. State, 851 N.E.2d 979, 982 (Ind. Ct. App. 2006) ("[T]his court has, on occasion, permitted claims for educational time credit to proceed in accordance with post-conviction procedures."). Similarly, Becker filed his motion before the same trial court that sentenced him and revoked his probation. A petitioner who has been denied post-conviction relief appeals from a negative judgment and must demonstrate on appeal that the evidence unerringly and unmistakably leads to a conclusion opposite that reached by the court. Ind. Post-Conviction Rule 1; Ivy v. State, 861 N.E.2d 1242, 1244 (Ind. Ct. App. 2007), trans. denied.

Indiana Code Section 35-50-6-3.3 provides that an inmate may earn six months of credit time for completing a GED. "The DOC maintains the responsibility to deny or restore credit time." Samuels v. State, 849 N.E.2d 689, 692 (Ind. Ct. App. 2006), trans. denied. The DOC denied Becker's 2008 request to add credit time for his 1994 educational achievement. Becker contends he was unfairly deprived of 151 days of credit

time in contravention of Indiana Code Section 35-50-6-5, which provides that violations of parole or probation may not be a basis for deprivation. Ind. Code § 35-50-6-5(a) (West 1994). The State contends that even assuming Becker only received twenty-nine days, Becker “lost the remaining 151 days when the trial court ordered execution of the entire sentence that was suspended.” Appellee’s Br. p. 6.

The record does not reveal why, if at all, the DOC granted Becker twenty-nine days, as he contends, of credit time during his first incarceration. Becker relies on a “Credit Calculation Detail” form obtained from the DOC on June 20, 2008. See App. p. 40. This form is not clear and quite confusing. Becker does not present additional evidence to explain the form, and the record does not reveal that any DOC official testified to confirm Becker’s assertions and interpretation of the form. One of the lines on the form actually indicates that Becker has accrued 274 days of credit time. Although notations of “29,” “58,” and “122” days appear on the line with the GED credit, it is unclear which of these figures actually factored into the calculation of Becker’s release date. App. p. 40.

Moreover, it appears Becker was otherwise scheduled for potential release dates of November 25, 1995, and November 25, 1994, and then he was actually released on October 21, 1994. Becker obviously benefitted from accrued credit time, though an accounting of exactly how is not part of this record. In addition, on October 18, 1994, the trial court awarded Becker fifty-three days of credit time. Again, the record does not reveal the source of such time and the DOC documents do not clearly show where it was applied.

When Becker's probation was revoked and remaining sentence reinstated in 1997 he received 759 days as credit time for confinement. Becker requests an additional 151 days of credit added to his 1997 probation revocation and reinstated rape sentence, yet does not provide us with a proposed release date, nor with information to recalculate a release date.⁵ Even the State acknowledges the confusing nature of the DOC documents provided by Becker, noting in its brief: "If this Court determines that relief is warranted, this cause should be remanded to the Department of Correction for clarification of the correct amount of educational credit time to be applied." Appellee's Br. p. 7.

The current version of Indiana Code Section 35-50-6-3.3 specifies the methods for applying credit time:

(h) Credit time earned by a person under subsection (a) for a diploma or degree completed before July 1, 1999, shall be subtracted from:

- (1) the release date that would otherwise apply to the person after subtracting all other credit time earned by the person, if the person has not been convicted of an offense described in subdivision (2); or
- (2) the period of imprisonment imposed on the person by the sentencing court, if the person has been convicted of one of the following crimes:

(A) Rape

⁵ Any release from this sentence would seemingly only affect the calculations of the start dates of the sentences he subsequently served and not actually result in a release from the DOC.

I.C. § 35-50-6-3.3(h). Section (h)(2) would apply to Becker, since he was convicted of rape, and would mean that 180 days should be subtracted from the period of imprisonment imposed by the sentencing court.

When Becker earned his 180 days of credit in 1994, however, the applicable statute did not contain the above section. It only specified that “in addition to any credit time a person earns under section 3 of this chapter and in addition to any reduction of sentence a person receives under IC 35-38-1-23, a person earns credit time” if the person completes a GED program after June 30, 1993 and “a person may not be deprived of credit time under this section.” I.C. § 35-5-6-3.3 (West 1994). This earlier version of the statute is silent as to whether the GED credit time is deducted from the release date or the period of imprisonment. Regardless of its method of application, Becker’s 180 days of credit time earned for completion of his GED should not be lost.

Although the State relies on Ind. Dept. of Correction v. Bogus, 754 N.E.2d 27, 31 (Ind. Ct. App. 2001), to support the proposition that any credit time not used prior to Becker’s release to parole is lost, we disagree. In Bogus, another panel of this court concluded that “educational credit time should only be applied to determine a defendant’s release date.” Bogus, 754 N.E.2d at 32. In Bogus’s situation, he was entitled to as many as 730 days, but applying only 370 of those days resulted in an immediate release to parole. When Bogus violated parole he was ordered to serve the remainder of his fixed term. Another panel of this court reasoned that Bogus “already received the full benefit of the educational time credit by being released to parole” and the remaining 360 were simply “lost.” Id.

Bogus expressly disagreed with the outcome in Renfroe v. State, 736 N.E.2d 797 (Ind. Ct. App. 2000), aff'd on rehearing, 743 N.E.2d 299 (Ind. Ct. App. 2001). In Renfroe, we concluded that credit earned for obtaining a GED should be applied to reduce the fixed sentence imposed by the trial court under the credit time statutes in effect in 1993-94 and 1995. We reasoned that sound public policy dictated rewarding an inmate's furtherance of education by subtracting up to six months from the inmate's fixed sentence in addition to any time earned for good behavior. Renfroe, 736 N.E.2d at 800.

We believe under the previous version of the credit time statute, that earning a GED entitles a defendant to 180 days of credit, even when that inmate is released to parole before enjoying the benefit of each of those days. We cannot agree with Bogus that this credit is merely "lost" if a defendant goes on parole and only enjoys a portion of the 180 days. When Becker's probation was revoked and remaining sentence reinstated in 1997, the reinstated sentence should have accounted for the remaining earned GED credit time. When it reinstated the remaining sentence, the trial court ordered 730 days of credit time for confinement, but did not note the remaining GED credit time. The DOC can make the adjustments to Becker's sentence. See Samuels v. State, 849 N.E.2d at 692 (explaining that modifications to credit time because of educational achievements are the responsibility of the DOC).

We conclude Becker's credit time must be adjusted here. We remand this cause to the post-conviction court with instructions to order the DOC to clarify Becker's total credit time received for his 1994 GED. If that time does not amount to the full 180 days, then the DOC is to add the remaining credit time to his 1994 sentence for rape and

recalculate his release date. We realize the 1994 sentence has been served; however, the release date on the 1994 sentence will implicate the start dates for sentences Becker served thereafter and is currently serving.

Conclusion

Becker is entitled to the entire 180 days of credit time for earning his GED and this time should be applied to his 1994 sentence for rape. Becker has undoubtedly received a portion of that time already. We remand to the post-conviction court with instructions to order the DOC to clarify the time Becker received for his GED in 1994 and add any remaining credit time to that sentence and adjust the release date accordingly. We reverse and remand.

Reversed and remanded.

BAILEY, J., and MATHIAS, J., concur.